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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1309

MARYLAND PUBLIC INTEREST RESEARCH GROUP,
Petitioner,

v.

WILSON H. ELKINS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GIRARDEAU A. SPANN
ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
202–785-3704

Attorneys for Petitioner

March 17, 1978

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Maryland Public Interest Research Group ("MaryPIRG"), plaintiff-appellee in the proceeding below, hereby petitions for a writ of certiorari to review the Judgment entered in this case by the United States Court of Appeals for the Fourth Circuit.[1]

OPINIONS BELOW

The opinion of the District Court is reported at 430 F. Supp. 387 (D. Md. 1976) and is reproduced at page 1a of

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[1] In addition to Wilson H. Elkins, President of the University of Maryland, respondents are the Chancellor of the College Park campus and the 14 members of the Board of Regents. Respondents are referred to collectively as the "Regents."

the Appendix. The opinion of the Court of Appeals is reported at 565 F.2d 864 (4th Cir. 1977) and is reproduced at page 22a. The unreported Order of the Court of Appeals Denying Rehearing and Rehearing *En Banc* is reproduced at page 28a.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 21, 1977. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on December 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May a state university, consistent with the First Amendment and the unconstitutional condition doctrine, require a recognized student organization to forego litigation conducted by its staff attorneys as a condition of receiving its share of student activity funds, while refusing to disclose any reason whatsoever for imposing such a restriction?

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

In 1974, the Regents of the University of Maryland approved the establishment of MaryPIRG as a campus public interest organization that would be of educational value to students at the University. They approved its funding from student activity fees that are collected expressly and exclusively for distribution to recognized student organizations such as MaryPIRG, and they approved the hiring of two staff attorneys whose salaries would be paid from those fees. Then, without explanation, the Regents imposed a single condition on the organization's receipt of its share of those funds: MaryPIRG's staff attorneys could not engage in litigation – an activity protected by the First Amendment. Moreover, the Regents steadfastly refused to disclose their reasons for imposing the restriction, even after being repeatedly urged to do so by the District Court. Instead, they maintained that their authority over University funds gave them the absolute discretion to withhold student activity funds for any reason, or for no reason at all.

The restriction, which is attached to MaryPIRG's sole source of funding, has proven to be a major obstacle because litigation is frequently important to the organization. MaryPIRG wishes to utilize litigation primarily to obtain documents under the State and Federal Freedom of Information Acts that are needed in connection with its investigations and other projects. Although such suits are relatively uncomplicated and inexpensive, they cannot be undertaken as long as MaryPIRG's staff attorneys are prohibited from conducting litigation. Consequently, after finding attorneys who agreed to represent the organization on a *pro bono* basis because of the importance of the First Amendment issues involved, MaryPIRG filed this action to enjoin enforcement of the litigation restriction.

In a detailed opinion written by Hon. Frank A. Kaufman, the District Court set the restriction aside, holding that the Regents could not single out litigation as a prohibited activity without first demonstrating that the restriction was narrowly tailored to advance some important state interest. [8a]. The Court also ruled that, even though the restriction was not a total prohibition on all litigation, abridgements of constitutional rights in the form of unconstitutional conditions imposed upon the receipt of funds are subject to the same strict First Amendment scrutiny that is required where direct prohibitions are at issue, relying on *Perry v. Sindermann*, 408 U.S. 593 (1972), and the long line of Supreme Court precedents cited in that case. [14a].

The Court of Appeals, however, reversed in an opinion written by Hon. Albert V. Bryan, Senior Circuit Judge, that is at odds with established law in two respects. First, despite the protection traditionally accorded the right to litigate, it accepted the Regents' unfettered-discretion argument and held that the First Amendment did not require the Regents to finance any activity of which they disapproved. [25a-26a]. Second, although the Regents themselves refused to justify the litigation restriction, the Court of Appeals supplied its own hypothetical justifications, even though they had no factual support in the record. Moreover, the Court went on to hold that even if the First Amendment did apply, those justifications would constitute compelling state interests. [26a-27a].

Petitioner then requested rehearing and suggested the appropriateness of rehearing *en banc* because of the inconsistency between the panel's decision and the line of Supreme Court precedents relied on by the District Court. Although a poll of the Court was requested, both rehearing and rehearing *en banc* were ultimately denied. [29a].

The issue presented by this case, therefore, is whether a university's decision not to finance a protected activity is entirely immune from constitutional scrutiny solely because the activity is abridged through a refusal to finance rather than through an absolute prohibition.[2]

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[2] Without citation to the record, the Court of Appeals asserted that there were ample other available sources of funding and termed the effect of the litigation restriction "slight." [25a]. However, not only is there no supporting evidence in the record for this assertion, but the District Court found as an uncontroverted fact, based upon petitioner's affidavits, that student activity funds comprised virtually the exclusive source of MaryPIRG's funds. [7a].

The reason that MaryPIRG must rely exclusively on those funds is that the Regents refused to allow it to be funded through a voluntary check-off mechanism whereby students could make contributions to MaryPIRG simply by checking a box on their university registration cards, and increasing their tuition-and-fee payments by the desired amount. Although more than 12,000 undergraduates – a majority of the College Park students – signed a petition to authorize such funding, the Regents abruptly refused to implement this funding mechanism after MaryPIRG became involved in a lawsuit instituted prior to the imposition of the litigation restriction, even though the Regents had already printed the necessary registration forms.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION SIGNIFICANTLY DEVIATES FROM THE PRIOR UNCONSTITUTIONAL CONDITION DECISIONS OF THIS COURT BY ALLOWING OFFICIALS TO DO INDIRECTLY THAT WHICH THEY ARE CONSTITUTIONALLY PROHIBITED FROM DOING DIRECTLY.

The Court of Appeals has permitted the Regents to utilize economic pressure as a means of requiring MaryPIRG to forego litigation – an activity protected by the First Amendment – which the Regents could not constitutionally prohibit directly in the absence of a compelling state interest. In so doing, the Court of Appeals deviated so far from the numerous precedents of this Court in prohibiting the imposition of unconstitutional conditions, that corrective action by this Court is required.

It is now firmly established that litigation is protected by the First Amendment, both as a means of petitioning the government for a redress of grievances, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972), and as an important component of the right to free association. *NAACP v. Button*, 371 U.S. 415, 430 (1963). Accordingly, this Court has consistently struck down as offensive to the First Amendment state attempts to interfere with the right to litigate. *See, e.g., United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 222-23 (1964). In addition, the Court has unambiguously held that constitutional rights are not diminished in a university setting but, on the contrary, require even more vigilant protection because of our heightened concern with free expression in such an environment. *Healy v. James*, 408 U.S. 169, 180 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).

These cases indicate that the Regents' litigation restriction could properly have been upheld only if respondents had demonstrated that it furthered a compelling state interest, and that it was narrowly drawn so as to entail the least possible intrusion on MaryPIRG's protected activities. *NAACP v. Button, supra*, 371 U.S. at 438-39; *Shelton v. Tucker*, 364 U.S. 479, 488-90 (1960). *Cf. United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), and cases cited therein. Respondents made no such showing, and the District Court, therefore, correctly set the litigation restriction aside.

Nevertheless, the Court of Appeals reversed, holding that First Amendment protections did not apply because the litigation restriction constituted only a condition of funding rather than an absolute prohibition. [25a]. Such reasoning, however, has already been rejected by this Court on numerous occasions under the unconstitutional condition doctrine. That doctrine was developed to prevent officials from using indirect means to discourage that which could not be constitutionally prohibited directly. Consequently, this Court has repeatedly struck down conditions imposed on the receipt of benefits where the conditions required the relinquishment of constitutional rights.

In *Perry v. Sindermann, supra*, 408 U.S. at 597, this Court cited 16 of its prior unconstitutional condition decisions in refusing to allow a state university to condition a professor's continued employment upon the surrender of his right to free expression. *Speiser v. Randall*, 357 U.S. 513 (1958), is even more directly in point. There, the Court prohibited the denial of tax benefits to individuals who would not agree to refrain from engaging in particular political activities. In *Healy v. James, supra*, another closely related case, this Court invalidated a university's refusal to extend the use of campus facilities to a politically controversial student group because of its political views.

Writing for the Court in *Healy*, Mr. Justice Powell discussed the purpose of the unconstitutional condition doctrine:

> We may concede . . . that the administration "has taken no direct action . . . to restrict the rights of petitioner's members to associate freely." But the Constitution's protection is not limited to direct interference with fundamental rights. . . . [I]n this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: "Freedoms such as these are protected not only against heavy handed frontal attack, but also from being stifled by more subtle governmental interference." [408 U.S. at 183, citations omitted].

That language applies with equal force to the present case. There is no doubt that the Regents could not flatly prohibit litigation without satisfying the traditional First Amendment standards. However, they have managed to achieve the same result by prohibiting the use of student activity funds for litigation. Since alternative funds are unavailable, the restriction is just as effective as an absolute ban would have been, but the Court of Appeals has allowed the Regents to circumvent the constitutional requirements that should have been applied.

The impact of the ruling below will not be limited to the facts of this case. The same type of abuse can occur in a wide variety of other circumstances, whenever public or quasi-public funding is provided to an individual or organization. According to the Court of Appeals' reasoning, government officials could freely do anything from censoring campus newspapers, to prohibiting welfare recipients from suing the

welfare department, and, by virtue of their control over funding, there would be no need to provide any justification for their actions. The Court of Appeals has modified the unconstitutional condition doctrine so radically that it can no longer adequately guard against the abuses that it was developed to prevent. Consequently, a reaffirmation of that doctrine by this Court is needed.

II. THE COURT OF APPEALS IMPROPERLY STRAYED FROM THE FACTUAL RECORD AND SUPPLIED ITS OWN HYPOTHETICAL JUSTIFICATIONS FOR THE LITIGATION RESTRICTION.

The Regents steadfastly refused to disclose the purpose for which they imposed the litigation restriction or to offer any justifications for the restriction at all. This was true not only at the administrative level, but also in the District Court, where the Court repeatedly requested the Regents to reveal their reasons for imposing the restriction. [*See* 12a & 16a-17a]. Despite the Regents' persistent refusal, however, the Court of Appeals chose to supply its own justifications. It literally created facts which were not only absent from the lower court record, but often were directly contradicted by that record. Then, the Court went on to hold that, even if the First Amendment did apply, those justifications constituted compelling state interests, sufficient to outweigh MaryPIRG's rights. [26a-27a].

It is axiomatic that a reviewing court may not create facts upon which to base its ruling because of the dangers to the proper administration of justice that are inherent in such a procedure. In fact, those dangers are particularly well illustrated in the present case. MaryPIRG has been told that it may not engage in litigation – an activity essential to the objectives for which it was founded – but it has never been

told why. The Regents have never been required to explain their actions, and MaryPIRG has never been given an opportunity to contest the veracity, validity, or constitutional sufficiency of the Regents' justifications. Rather, the Court of Appeals simply assumed that the Regents must have had some adequate reason for imposing the restriction, and cited several hypothetical reasons of its own to support that view. Such a procedure is manifestly improper where the exercise of an important First Amendment right is at stake. Consequently, this Court should also grant review to remedy the procedures employed by the Court of Appeals in upholding the Regents' actions.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari and grant plenary review of the constitutional issues presented.

Respectfully submitted,

GIRARDEAU A. SPANN
ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
202–785-3704

Attorneys for Petitioner

March 17, 1978

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND PUBLIC INTEREST RESEARCH GROUP	:	
V.	:	CIVIL NO.
WILSON H. ELKINS, Individually and as President of the University of Maryland, et al.	:	K-75-1751

Filed: December 30, 1976

KAUFMAN, DISTRICT JUDGE.

Maryland Public Interest Research Group (MaryPIRG) seeks declaratory and injunctive relief against the President and Board of Regents of the University of Maryland, each of the members of the Board of Regents, and the Chancellor of the College Park Campus of said University. All defendants other than the Board itself are named as defendants in their individual as well as their official capacities. Jurisdiction exists in this case pursuant to 28 U.S.C. § 1343, the jurisdictional counterpart of 42 U.S.C. § 1983,[1] except

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[1] Jurisdiction is also alleged under 28 U.S.C. § 1331. However, there is a factual issue as to whether the jurisdictional amount is met. The appropriation requested by MaryPIRG from the SGA for all of MaryPIRG's special projects, including litigation expenses, was $1760. The amount approved for those projects, in both fiscal years involved herein, by the SGA and the Board of Regents was for less than $10,000 even if the salary of MaryPIRG's Executive Director, an attorney, is deemed legal expense and part of the alleged amount at stake in this case. It is also to be noted that possible future appropriations probably may not be added for purposes of 1331's $10,000 requirement because there is no certainty plaintiff will re-

perhaps as to the defendant Board of Regents. The latter may not be a "person" within the meaning of section 1983. *See* Sheppard v. West Va. Bd. of Regents, 378 F. Supp. 4, 6 (S.D.W.Va. 1974), *aff'd*, 516 F.2d 826 (4th Cir. 1975). In that case, however, Judge Thomsen of this Court, sitting by designation on the Fourth Circuit, declined to decide the question of whether section 1983 relief could be granted against the Board "because the members of the Board were sued individually". *Id.* at 829. The same situation exists herein. Accordingly, no relief is needed against the Board as an entity in this case and none will be granted.[2]

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ceive any future allocations, since, subject to its constitutional and lawful exercise thereof, the Board of Regents has the on-going discretionary authority and duty to make appropriations for student activities on a year-by-year basis. *See generally* Md. Ann. Code art. 77A, § 15, *as amended* (Cum. Supp. 1975). In any event, in this case, those 1331 jurisdictional issues need not be resolved since other subject matter jurisdiction independently exists. That jurisdictional base is 28 U.S.C. § 1343(3), the jurisdictional counterpart of 42 U.S.C. § 1983, in view of plaintiff's allegations that defendants, acting under color of state law, have deprived plaintiff of rights and liberties secured by the Constitution and laws of the United States.

[2] Seemingly, there is a difference among the circuits with regard to the question left unanswered by Judge Thomsen in *Sheppard* and herein. *Compare* Blanton v. State Univ. of N.Y., 489 F.2d 377 (2d Cir. 1973) (Friendly, J.) (state university not a "person") *and* Whitnever v. Davis, 410 F.2d 24, 29-30 (9th Cir. 1969) (state college not a "person"), *with* Lee v. Board of Regents of State College, 441 F.2d 1257 (7th Cir. 1971) (board of regents is a "person") *and* Stebbins v. Weaver, 396 F. Supp. 104, 108 (W.D. Wis. 1975) (board of regents is a "person"). The question is not addressed by the Supreme Court or the Seventh Circuit in Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), *reversing on other grounds* 446 F.2d 806 (7th Cir. 1971), *aff'g* 310 F. Supp. 972 (W.D. Wis. 1970). The district court in *Roth* had specifically held that the board of regents was a "person" within 1983. 310 F. Supp. *supra* at 974.

Plaintiff alleges that defendants are abridging plaintiff's first amendment rights of free expression and association and also its first amendment rights to petition the Government for redress of grievances, by placing upon the use by plaintiff of funds appropriated for plaintiff by the Board of Regents, the condition that plaintiff not use any part of those funds to pay litigation expenses. Plaintiff also contends that defendants' actions violate plaintiff's fourteenth amendment rights to due process and equal protection. Plaintiff MaryPIRG is a student organization whose stated purpose is to advocate the public interest in areas of concern to students enrolled on the College Park Campus. On February 12, 1974, the Student Government Association (SGA) approved MaryPIRG's constitution, thus making plaintiff an approved organization and as such an entity eligible to request and to receive appropriations out of the Student Activities Fund which is administered by SGA. The latter, after receiving requests for allocations from the fund by organizations approved by it, prepares a budget for the fund. The budget is then submitted by SGA to the Board of Regents for modification and/or approval. Following MaryPIRG's request to SGA for $37,997 for fiscal year 1974-75, SGA included an allocation for MaryPIRG in SGA's 1974-75 budget submitted to the Board of Regents, but in the reduced amount of $25,437. When the Board of Regents, at its meeting on September 20, 1974, considered SGA's 1974-75 proposed budget, the President, defendant Elkins, stated his understanding that the Attorney General of Maryland had ruled that no one could employ counsel to represent students out of University funds except as authorized by the Attorney General. As a result, the Board of Regents approved the allocation for MaryPIRG, subject to the condition that plaintiff not use any of the funds so appropriated to pay litigation expenses. On December 4, 1975, the Board of Regents approved an appro-

priation of $38,619 for MaryPIRG for 1975-76, but again subjected that appropriation to the above-stated restriction. On August 27, 1976, the Board approved another appropriation subject to the same restriction.

MaryPIRG, contending that that restriction has rendered it unable to resort to litigation in several instances in which it would have been advantageous for it so to do,[3] seeks (a) a declaratory judgment that the no-litigation restriction is unconstitutional under the first and fourteenth amendments of the United States Constitution and (b) an injunction restraining defendants from continuing in force and effect that restriction.

Defendants have moved to dismiss or in the alternative for summary judgment on several grounds. Plaintiff, in turn, has moved for summary judgment on the basis of its first amendment contentions. Plaintiff admits that its four-

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[3] In his affidavit Robert Lederer, former chairperson of MaryPIRG, states that plaintiff has a frequent need to litigate to obtain documents under the Maryland Public Information Act and the Federal Freedom of Information Act, which documents are relevant to investigations engaged in by MaryPIRG. In addition, Lederer states that MaryPIRG would have engaged in substantial litigation on several occasions but for the restriction. While there is no explicit statement by Lederer in his said affidavit that it is made by him on the basis of personal knowledge, implicit in the first and last paragraphs thereof are such assertions. Nor do defendants by any Rule 56 submissions controvert the assertions made in those two paragraphs. MaryPIRG's past record of participation in litigation, *e.g.*, Public Citizen, et al. v. Commission on Medical Discipline, Civil No. 74-56-B (D. Md. opinion filed June 24, 1976) (three-judge court before which MaryPIRG was one of the plaintiffs), and its present prosecution of this case, funded by means independent of the SGA allocation, show that there is no genuine factual dispute with regard to MaryPIRG's present and on-going desire and intention to engage in litigation.

teenth amendment due process and equal protection claims[4] are not presently ripe for summary judgment, but correctly

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[4] In an affidavit Robert Lederer states as follows:

> * * * In conducting its fall survey of area banks, MaryPIRG noticed that the Chevy Chase Bank and Trust Co., which offered free checking services, had in June, 1973 entered the lowest bid for establishment of a branch bank on the College Park campus. A campus branch bank offering free checking would save the university students and personnel up to $300,000 per year, would provide income for the University through rent payments, and would relieve the University of the burden of operating a check cashing service. Because of these benefits the University community favored the opening of a campus branch bank. Although the Chevy Chase branch application had at that time been pending for a year and a half before the State Bank Commissioner, the application had never been acted on, even though such applications are generally approved within a few months. In February 1975, MaryPIRG urged the Commissioner to expedite approval of the application, but one month later the application was denied without any stated reason. MaryPIRG's investigation, however, revealed that the University had deposits of about $100 million in another bank that would suffer competitive injury from the opening of a Chevy Chase branch on the College Park campus. Moreover, MaryPIRG discovered that the President of the University of Maryland was a director of the competing bank, thereby creating a potential conflict of interest. MaryPIRG successfully urged state legislators to investigate the matter and a joint committee of the Maryland General Assembly then held hearings. At the time those hearings were held in June, 1975 it was also revealed that on three separate occasions, the Chairman of the Board of Regents had threatened to cut off MaryPIRG's funding if it persisted in the bank investigation. MaryPIRG did persist, however, and on July 30, 1975, after MaryPIRG testified before the State Board of Ethics concerning the potential conflict of interest,

points out that those issues need not be reached herein if plaintiff is successful in its quest for relief in connection with its first amendment grounds. Since this Court concludes herein that plaintiff is entitled to relief on first amendment grounds, the due process and equal protection questions are not further discussed in this opinion except to note that the requirements of due process in the context of appropriations, for organizations approved by SGA, by the Board of Regents were the subject of earlier litigation in this Court. Bovello v. Kaplan, No. 71-1306-M (D. Md. filed August 30, 1972), *vacated as moot*, No. 72-2305 (4th Cir. filed April 16, 1973).[5]

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the President of the University resigned from the board of directors of the competing bank. In addition, after a renewed application was approved by the Bank Commissioner in September, 1975, the campus branch bank opened in December 1975.

* * * The animosity that the bank project caused on the part of the Regents was increased when MaryPIRG participated with SGA and Common Cause in a study of the University athletic department which concluded that the University was unlawfully discriminating on the basis of sex in violation of Title IX of the Federal Education Act of 1972. The study, which found gross disparities between the athletic treatment and facilities available for men and those available for women, made specific recommendations for improvement designed to bring the University into compliance with Title IX. It is too soon to determine whether that study, which was released on November 21, 1975, will result in needed remedial action, but the study has further strained the relationship between MaryPIRG and the Regents.

These allegations of retaliatory purpose are part and parcel of plaintiff's fourteenth amendment claims. Defendants deny those allegations, thus making summary judgment inappropriate to those claims.

[5] Copies of those opinions have been made a part of the official court file in this case.

Mootness and Ripeness

Defendants contend that this case is both moot and not ripe. As to mootness, defendants point to an editorial in the January 19, 1976 issue of the *Diamondback*, the College Park student newspaper, which contained the statement that MaryPIRG "has declared its desire to further disassociate itself from SGA by not taking money from it." In affidavits made on February 26, 1976, subsequent to the appearance of the *Diamondback* article, Paul Muntjan and Robert Lederer, both members and former chairpersons of MaryPIRG's Board of Directors, have stated that virtually all of MaryPIRG's funds come from SGA appropriations.[6] Those affidavits have not been controverted by defendants. Moreover, the parties have stipulated that on August 27, 1976, the Board of Regents approved the SGA recommended allocation of student activities fees to MaryPIRG for 1976-77. Thus, this case is not moot.

As to ripeness defendants argue that plaintiff's desire to litigate lacks specificity, is speculative and, in any event, in the context of the amount of the appropriations to date for litigation, involves no foreseeable litigation by plaintiff of any substantial nature. Defendants point out that SGA itself reduced plaintiff's litigation requests without objection by plaintiff. However, the record establishes that if the restriction of which plaintiff complains was not in existence, plaintiff would in fact engage in additional litigation. Accordingly, the defendants' ripeness argument is without merit. Thus, the merits of plaintiff's first amendment claims must be reached herein.

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[6] Lederer Affidavit, paragraph 9; Muntjan Affidavit, paragraph 2.

Merits

To prevail herein on the basis of its first amendment claims, plaintiff must establish that the activity which plaintiff desires to engage in and would engage in but for the alleged unlawful infringement by defendants is an activity protected by the first amendment, and that defendants are in fact restricting such protected activity. If plaintiff so establishes, then the State must in turn establish that its actions advance a substantial governmental purpose unrelated to suppression of plaintiff's first amendment rights, and also that those actions embody no greater infringement upon plaintiff's protected interests than is necessary to advance the legitimate governmental interests involved.

United States v. O'Brien, 391 U.S. 367 (1968), is a criminal case involving the burning of a draft card in which the defendant's conviction was upheld. In the course of weighing and balancing the important governmental interest in having available sufficient potential members of the military and in otherwise administering its draft laws against the claimed first amendment right of the defendant to express symbolically his anti-war beliefs by destruction of his draft card, Mr. Chief Justice Warren opted for the former. In so doing, he wrote (at 376-77) that even assuming

> that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, * * * a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever im-

> precision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. * * * [Footnotes omitted.]

First Amendment issues in a university or school context have been presented to the Supreme Court in a number of cases, including Healy v. James, 408 U.S. 169 (1972); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); and Shelton v. Tucker, 364 U.S. 479 (1960). *Shelton* held that an Alabama statute requiring public school teachers annually to file affidavits giving names and addresses of all organizations to which they had belonged or contributed within the preceding five years was unconstitutional as applied to untenured teachers. Noting (at 485) the importance and "the relevance of a State's inquiry into the fitness and competence of its teachers", Mr. Justice Stewart in a 5-4 decision also wrote (at 485-86) that "to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right, which like free speech, lies at the foundation of a free society." The Justice also observed (at 487) that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" and noted (at 488): "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The

breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose" (Footnotes omitted). Dissenting, Mr. Justice Frankfurter concluded (at 496) that the "restriction" imposed upon the "liberty" of the teachers "or upon that of the community" was not such "as to overbalance the State's interest * * *." Dissenting also, Mr. Justice Harlan wrote (at 497-98):

> The rights of free speech and association embodied in the "liberty" assured against state action by the Fourteenth Amendment * * * are not absolute. * * * Where official action is claimed to invade these rights, the controlling inquiry is whether such action is justifiable on the basis of a superior governmental interest to which such individual rights must yield. When the action complained of pertains to the realm of investigation, our inquiry has a double aspect: first, whether the investigation relates to a legitimate governmental purpose; second, whether, judged in the light of that purpose, the questioned action has substantial relevance thereto. * * *
>
> In the two cases at hand, I think both factors are satisfied. * * *

In Tinker v. Des Moines Community School Dist., *supra*, with Mr. Justice Black and Mr. Justice Harlan dissenting, Mr. Justice Fortas held that the wearing of black armbands by students on school facilities in violation of a school regulation, for the purpose of expressing views against the Vietnamese war, was "the type of symbolic act that is within the Free Speech Clause of the First Amendment" (at 505) and was not on balance sufficiently disruptive of state interests so as to outweigh the first amendment rights

of the students. In so holding, the Justice wrote (at 506):

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. * * *

The majority opinion in *Tinker* also contains this teaching (at 509):

> Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. Burnside v. Byars, * * * [363 F.2d 744, 749 (5th Cir. 1966)].

Mr. Justice Powell, in *Healy v. James, supra,* noted (at 171) at the outset of his opinion that the "interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process" and "the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order" sometimes "compete" and must be balanced. In *Healy*, the application of plaintiffs requesting official status, as a campus organization, for their local chapter of Students for a Democratic Society had been denied by a state college after evidentiary hearings. After observing (at 180) that "state colleges and universities are not enclaves immune from the sweep of the First Amendment" and citing and quoting from *Tinker* and *Shelton* in support

of that conclusion, Mr. Justice Powell, in the course of remanding for further factual developments and findings, wrote (at 184) that "once petitioners had filed an application in conformity with the requirements [of the College], the burden was upon the College administration to justify its decision of rejection. * * * It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint * * *. While a college has a legitimate interest in preventing disruption on the campus * * *, a *'heavy* burden' rests on the college to demonstrate the appropriateness of that action." (Emphasis added.)

Defendants, in effect, seem to urge not only that their judgmental balancing of interests should be given great weight but that it should almost be deemed controlling by this Court. If that is defendants' position, this Court cannot accept it. If plaintiff's constitutional rights are being infringed, it is this Court, not the state agency, which must make the ultimate balancing determination. Thus, in a case involving a most sensitive situation – regulations of the National Park Service concerning public gatherings on the White House sidewalk on Pennsylvania Avenue and in Lafayette Park – Judge Leventhal wrote that "this case is not a normal review of an executive action or administrative proceeding. When the executive or the administrative process abridges constitutional rights, it is subject to closer scrutiny than otherwise, and ultimately it is the court rather than the agency that must balance the competing interests." A Quaker Action Group v. Morton, 516 F.2d 717, 723 (D.C. Cir. 1975). Of course, in so doing, the court should always give great weight to the views and determinations of those charged by the state with the performance of administrative duties and the exercise of discretion in accordance therewith. But the court, in the end, must

balance the competing interests and determine which outweighs the other.

The right of access to the courts is a freedom protected by the first amendment against abridgement by the Federal Government, and, through the due process clause of the fourteenth amendment, by state governments as well. *See* California Motor Transit Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). *See also* Carter v. Lally, __F.Supp. ___ (D. Md., Civil No. 72-642-K, December 27, 1976) and cases cited therein. Defendants do not contest that conclusion. However, defendants contend herein that they have not violated any such right of plaintiff. Rather they argue that they have placed no affirmative restriction on plaintiff's right to litigate. Rather, say defendants, they have merely refused to allow MaryPIRG to use certain state funds to finance certain of MaryPIRG activities, and that such refusal is not a prohibited impairment of plaintiff's first amendment rights. Defendants cite in support of their arguments Winston-Salem/Forsyth County Unit of North Carolina Ass'n of Educ. v. Phillips, 381 F. Supp. 644 (M.D.N.C. 1974); National Strike Information Center v. Brandeis University, 315 F. Supp. 928 (D. Mass. 1970); Lawrence Gay Liberation Front v. University of Kansas, Civil No. T-5069 (D. Kan. February 10, 1972), *aff'd*, Civil No. 72-1159 (10th Cir. March 12, 1973).[7] The *Winston-Salem* case involved a North Carolina statutory prohibition against contracts between state governmental units and public employee labor organizations. In the *Brandeis* case, Judge Caffrey dealt with the question of whether the defendant University was required to subsidize certain activities and to make certain facilities available to plaintiff, and held in the negative.

[7] A copy of the opinions of the Circuit and District Courts in that last-cited case are in the court file in this case.

In the *Kansas* case, injunctive relief was unsuccessfully sought to enjoin the denial of recognition as a campus organization to a "gay front" group. As to the validity in this Court of that holding in the *Kansas* case, *see* Gay Alliance, etc. v. Matthews, et al., ___F.2d ___(4th Cir. October 28, 1976). None of the three cases involved the placing of a condition or a restriction on the use of funds or of anything else. That is the context in which the within case arises. With regard to that type of issue, writing in Perry v. Sindermann, 408 U.S. 593 (1972), for a unanimous Supreme Court, Mr. Justice Stewart observed (at 597):

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited * * *. Such interference with constitutional rights is impermissible.

While MaryPIRG's appropriation has not been terminated outright, as was Sindermann's employment contract, because of the latter's exercise of first amendment rights, implicit if not explicit in the restriction prohibiting MaryPIRG's use of funds for litigation is the University position that MaryPIRG's funding will be cut off if MaryPIRG engages in litigation. If, as this Court concludes and defendants appear not to controvert, MaryPIRG has a constitutional right to engage in litigation, then defendants, through the litigation restriction, have infringed upon activity of plaintiff protected by the first amendment. That infringement requires justification by defendants.

The minutes of the Board of Regents' September 20, 1974 meeting includes the following:

> Regent Tydings moved that the Board of Regents approve the allocation by the Student Government Association of the College Park campus of $25,437 to the campus chapter of MaryPIRG, the funds to be disbursed in conformity with all applicable rules and regulations of the University.
>
> Regent Connelly asked about legal counsel that could be provided.
>
> President Elkins said the Attorney General has ruled that nobody can employ counsel out of University funds, except by permission of the Attorney General's Office. He said that we may employ people who have equal knowledge and a degree to offer advice and counsel. However, they cannot represent the students.
>
> Regent Connelly remarked that that means that members of the Bar may be employed to review documents, give advice, but not represent the students.
>
> Mr. Case said that the point is well taken. He said he did not think that it was clear that this appropriation was to be subject to the laws of the state and subject to the opinions of the Attorney General. He said: "Just so everybody

knows where we stand and there is no doubt about it, I suggest that in the last full line of the resolution after the word 'with' you insert 'the laws of this state, the opinions of the Attorney General and.' In that way, with those words, there can't be any question about it."

The Board of Regents approved the amendment to the motion and then passed the amended motion.

The minutes of the Board's meeting on December 4, 1975 contain the following entry:

The fourth condition is that the Board of Regents reaffirms its position of September 20, 1974, that funds drawn by a student organization from S.G.A. allocations shall be disbursed in conformity with the laws of this state, the opinions of the Attorney General and all applicable rules and regulations of the University and shall not be used for litigation.

It is arguable that the governmental interest involved in the restrictive condition adopted by the Regents was simply a desire to insure conformance with and obedience to state law. That desire would require examination by this Court into the interest underlying the state law in question, were it not that defendants have in no way and at no time shown that there is such a state law. Plaintiff alleges that the real motivation for the restriction simply was and is a desire of defendants to prevent MaryPIRG from engaging in activities similar to its prior actions – actions which MaryPIRG claims have caused embarrassment to Defendant Elkins and to certain members of the Board of Regents.[8] Even if that con-

[8] *See* n. 4 *supra.*

tention is assumed totally false, defendants have not demonstrated any substantial valid interest in the restriction. During a hearing on the record in this Court on May 6, 1976, defendants suggested that they might present a justification for the restriction based upon educational purpose. However, other than that conclusory assertion, no such presentation has been forthcoming from defendants. Defendants have, however, filed an affidavit of Janet A. Manger that the University's Regents have never approved an allocation of student activities fees to any student organization for use for litigation purposes. Plaintiff has not controverted that assertion. In any event, in the context of plaintiff's summary judgment motion, that fact is deemed established. However, it hardly adds up to anything other than an unsupported assertion of a valid governmental need to impose and maintain the restriction of which MaryPIRG complains. Accordingly, plaintiff is entitled to the grant of its motion for summary judgment on first amendment grounds.

Relief

In Nitzberg v. Parks, 525 F.2d 378, 384-85 (4th Cir. 1975), a case involving public secondary school regulation of student publications at a Baltimore County senior high school, Mr. Justice Clark, sitting by designation, aptly described the dilemma in which a federal court finds itself in a case such as this:

This is the third time that this circuit has been confronted with the free speech aspects of secondary public school regulations and found it necessary to intervene in the conduct of such matters by the local school authorities. We deplore this, as was said in the first case "because it is not the policy of Federal Courts to 'intervene in the resolution of conflicts which arise in the daily opera-

tion of the school systems and which do not directly and sharply implicate basic constitutional values.'" *Quarterman v. Byrd*, * * * [453 F.2d 54, 56 (4th Cir. 1971)]. Moreover, the Supreme Court itself has "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines School Dist., supra*, 393 U.S. at 507. Nevertheless, we cannot remain silent when we truly believe that the regulations as presently written will raise more problems than they will solve. We have both compassion and understanding of the difficulties facing school administrators, but we cannot permit those conditions to suppress the First Amendment rights of individual students.

In *Nitzberg*, the school regulations were changed four times after litigation commenced. In the within case, in an attempt to fashion a decree which will permanently resolve the conflict between the parties, this Court, after informing counsel for both sides that it would enter judgment in favor of plaintiff MaryPIRG, requested the parties, without prejudice to any appeal from that judgment, to explore the possibility of a joint proposal for new standards governing MaryPIRG's litigation activities. In so doing, this Court sought to avoid extended litigation similar to that in *Nitzberg* and other cases which might result should this Court simply strike down the existing restriction of which MaryPIRG complains and leave formulation of different standards in the first instance to defendants. However, although counsel for the parties did meet to discuss that possibility, their efforts bore no fruit. Defendants subsequently notified this

Court of their intention to appeal from any judgment of this Court holding the restriction in question in this case unconstitutional, that they did not desire to indicate any agreement, on a secondary basis or otherwise, in connection with any removal or alteration of that restriction, and that in defendants' view, if this Court was going to hold that restriction unconstitutional, it should refrain at this time from formulating any decree setting forth specific relief.

Plaintiff, asserting its belief that it has a present right to unfettered use of the appropriated funds and complaining that this Court should not "lead defendants by the hand" to a valid restriction, seek a decree unconditionally voiding the existing restriction and enjoining defendants from promulgating any new restriction without giving plaintiff the advance opportunity to contest the legality of such new restriction in a court proceeding. This Court declines to follow either party's desires in those connections. This Court believes that it is preferable for it to balance the conflicting interests discussed by Mr. Justice Clark in *Nitzberg* and to do its best to avoid continuing litigation in connection therewith. Accordingly, the following Decree is today being entered. However, the Decree shall not become effective (a) unless defendants do not timely note an appeal from the judgment herein to the Fourth Circuit or (b) if such an appeal is noted, until the Fourth Circuit has entered its judgment in this case.

DECREE

This case comes before the Court on plaintiff's complaint for declaratory and injunctive relief brought under 42 U.S.C. § 1983 and on the cross-motions of the parties for summary judgment. For the reasons set forth by this Court in its opinion

of even date herewith, (1) summary judgment is hereby granted in favor of plaintiff and denied to defendants;[9] and (2) it is hereby, this 30th day of December, 1976, DECLARED, ORDERED, ADJUDGED and DECREED: Defendants,[10] their officers, agents, employees and successors shall not prohibit or restrict the use by plaintiff MaryPIRG of SGA appropriations for litigation activities which are conducted by MaryPIRG to protect its interests as an organization, or to enable it to gather information relating to public interest concerns which affect students at the College Park Campus of the University of Maryland, or to advocate the public interest in connection with issues which concern and affect those students. Further, defendants shall not limit or withhold use of past SGA appropriations for MaryPIRG or of approval of future SGA appropriations for MaryPIRG, in order to interfere with MaryPIRG's use of such funds for such litigation activities.

Costs of this case shall be borne by defendants.

/s/ Frank A. Kaufman
United States District
Judge

---

9 *See* n.10, *infra.*

10 No relief is granted against the Board of Regents and summary judgment is hereby entered in favor of that defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND PUBLIC INTEREST RESEARCH GROUP	:	
v.	:	CIVIL NO.
WILSON H. ELKINS, Individually and as President of the University of Maryland, et al.	:	K-75-1751

ORDER AND DECREE

For reasons set forth in an Opinion filed earlier today, judgment is hereby entered in favor of plaintiff against all defendants other than the Board of Regents and is hereby entered in favor of that said defendant. The Decree set forth at pp. 17-18 of that Opinion shall become effective as provided therein. The Clerk is directed to send copies of that Opinion and of this Order and Decree to counsel of record. It is so ORDERED, this 30th day of December, 1976.

/s/ Frank A. Kaufman
United States District
Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77 - 1250

Maryland Public Interest Research Group,

Appellees,

v.

Wilson H. Elkins, *et al.*,

Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frank A. Kaufman, District Judge.

(Argued: June 9, 1977 Decided: November 21, 1977

Before BRYAN, Senior Circuit Judge, RUSSELL and HALL, Circuit Judges.

Albert V. Bryan, Senior Circuit Judge:

This First Amendment[1] case questions the right of the Board of Regents, the governing body of the University of Maryland, College Park Campus, to forbid a recognized student organization to use its share of the institution's required student-activities-fees for purposes of litigation.[2]

[1] "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances."

The organization, styled the Maryland Public Interest Research Group (MaryPIRG), was accorded official standing at the University "to advocate the public interest in areas of concern to students enrolled in the College Park Campus". Sponsored projects are those designed to enhance the educational experience of its volunteers through participation in investigation, study and exposition of current social problems among the student body as well as the people generally. Among others, these comprehended unjust apartment rents, discriminatory employment practices, secrecy of Government papers, public health research and official misconduct of public and University officials. It is staffed not only by students but also with attorneys who provide the counselling where legal matters are implicated. In its areas, MaryPIRG pleads, it needs resort to the courts for substantive relief advancing its goals, particularly in seeking information from Governmental agencies.

The group received the approval of the Student Government Association (SGA), the agency responsible for advising the University on allocations of the student-activities-fees. SGA receives a budget from each student activity detailing the funds desired for pursuit of its enterprises. This submission, after evaluation by SGA, is passed on to the Regents for approval, modification or rejection.

Beginning in the 1974-75 academic year, MaryPIRG asked for an allowance by SGA to include moneys for "project expenses" consisting of litigation costs. The request was

[2] The District Court explicitly confined its decision to First Amendment considerations as made applicable to the State by the Fourteenth Amendment.

granted in a reduced sum. Thereafter the Regents approved the SGA recommendation, "on the condition that [MaryPIRG] not use any of the funds so appropriated to pay litigation expenses". This limitation has continued in subsequent years, although larger amounts have been allocated to MaryPIRG for its general aims.

Suit was commenced by MaryPIRG in December 1975 challenging the litigation restriction as trenching upon its "first amendment rights to free expression and association, and to petition the government for a redress of grievances", with the last including, as it does, access to the courts.[3] While other sanctuaries were alleged as invaded, these issues were not reached by the trial court and are not presented on this appeal. The President of the University and the Board of Regents, as well as the other concerned defendants answered, denying the incursion and explaining that MaryPIRG was not denuded of its right to litigate, but only barred from using in that way funds derived from the University. Furthermore, in response it maintained that the restriction squared with the University's obligation to all students: to expend funds only for educational purposes.

With no factual dispute before him, the District Judge summarily upheld MaryPIRG's claimed First Amendment grievances and enjoined enforcement of the litigation exclusion, apparently relying on Perry v. Sindermann, 408 US 593 (1972). On the defendants' appeal, we conclude that the University acted within its prerogatives, without "abridging" the plaintiff's privileges, and not contrary to the law of *Sindermann*.

---

[3] Jurisdiction was laid under 28 USC 1343(3).

I.

Freedom to sue has not been denied MaryPIRG by the Board's resolve. Only the direction of State funds to that end has been withdrawn; otherwise it may go to court unreservedly. Moneys received as gifts, contributions or from other sources, such as "several Maryland campuses", may be devoted to such ends as MaryPIRG may wish. Actually the restriction is not a bar practically, for the record reveals that there are in truth such outside funds available and reasonably to be anticipated. The sum sought of the University for this purpose was budgeted at $1,760.00 in the academic year when the limitation was enacted and this suit begun. At the same time the overall request was for $37,997.00, of which SGA approved $25,437.00. Of this amount only $850.00 was allotted to "project expenses", the item including suit money. This analysis demonstrates how slight was the Board's deprivation and how readily other assists to MaryPIRG could carry litigation.

These figures destroy the slightest hint of discrimination. Other proofs evincing fair treatment of MaryPIRG are these: its participants are credited on their academic records for their work; office space is provided on campus; and procurement of furniture is assisted. In 1974 it was the beneficiary of the next to largest share of student-activity-fees among the 40 campus groups, and in 1975-76 the largest, $38,619.00, was accorded the plaintiff. Even after the litigation embargo was actuated MaryPIRG was granted the equivalent of its previous year's allowance.

There is no affirmative commandment upon the University to activate MaryPIRG's exercise of First Amendment guarantees; the only commandment is not to infringe their enjoyment. Presently, no such result has been incident to the promulgation of the restriction. In reality, the plain-

tiff is asking the Board to finance the plaintiff's assertion of the Amendment. In this it cannot succeed. Cammarano v. United States, 358 US 498 (1959). The Court there saw no overstepping of Constitutional barriers in the Government's consequential discouragement of programs of publicity – obviously a First Amendment privilege – directed against legislative proposals by disallowing the contributions thereto as deductions in income tax returns for "ordinary and business" expenses. *Id.* at 513. If such a restriction may be indulged the Federal Government, *a fortiori,* a like immunity may be permitted the University. Either may put the cost thereof upon those who exercise it rather than upon those who simply abide it.

II.

The thesis for the decision on review, thoughtfully expounded by the District Judge, is that the Board of Regents could not constitutionally prevent the use of student-activities-fees for litigation by MaryPIRG – a form of prior restraint – without advancing a compelling State interest sufficient to justify an exception to the First Amendment's preclusion. The burden of this showing, he believed, was upon the Regents. *Cf.* Healy v. James, 408 US 169, 184 (1972). But even accepting this premise *arguendo,* it cannot be doubted that the facts here demonstrated a State interest so compelling as to remove its action from the play of the Amendment.

To begin with, in the circumstances the employment of the mandatory fees is primarily a determination for the Board. *Ex facie* it is a concern within its governmental province – a matter *intra vires* the Board. Further, we cannot see the limitation as an ill-advised policy or abused discretion. On the contrary, its soundness is testified to by the

well recognized considerations now to be mentioned. The group is already provided the counsel of lawyers. As its members are not law students, litigation would not be a form of education for them. Throughout pendency, from commencement to judgment, suits and actions would assume in the public mind the stature of declarations of University thought as well as that of its entire student body, while in truth it could well be neither.

In this vein, it is important to know that MaryPIRG and its operations find many students in disagreement with its creed. Hence, without the restriction the Regents would find themselves devoting moneys, in part forcibly demanded of the dissidents, to causes distasteful to them. A further understandable motivation of the Board was the apprehension that litigation by MaryPIRG could result in assessment of costs, or judgments for other liabilities, against it, in the event of unsuccess at trials. The Board prefers that the University stand neutral, both actually and apparently. Other instances are not hard to conceive, justifying the wisdom of a prohibition of the outlay of fees to finance litigation.

The facts alone in this case create compelling grounds for letting the Board's restriction survive the exactions of the First Amendment.

The decree and orders on appeal must be set aside.

Vacated.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1250

[Filed Dec. 20, 1977]

Maryland Public Interest Research Group,

Appellees,

versus

Wilson H. Elkins, Individually and as President of the University of Maryland; Robert Gluckstern, Individually and as Chancellor of the College Park Campus University of Maryland; Board of Regents of the University of Maryland; B. Herbert Brown; Hugh A. McMullen; Samuel H. Hoover; L. Mercer Smith; William G. Connelly; N. Thomas Whittington, Jr.; Mary H. Broadwater; Hon. Young D. Hance; Edward V. Hurley; Louis L. Kaplan; Peter F. O'Malley; Judith S. Sachwald; John C. Scarbath; Hon. Joseph D. Tydings, Individually and as Members of the Board of Regents of the University of Maryland,

Appellants.

ORDER

The appellee's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll a majority of the judges eligible to vote, voted to deny rehearing en banc.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Bryan for a panel consisting of Judge Bryan, Judge Russell, and Judge Hall.

For the Court

/s/ William K. Slate, II
Clerk

A True Copy, Teste:
William K. Slate, II, Clerk

By /s/ Emily Rueger

Supreme Court, U. S.
FILED
APR 12 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1309

MARYLAND PUBLIC INTEREST RESEARCH GROUP,
Petitioner,

v.

WILSON H. ELKINS ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

FRANCIS B. BURCH,
Attorney General,
STEVEN P. RESNICK,
Assistant Attorney General,
1400 ONe South Calvert Bldg.,
Baltimore, Maryland 21202,
Attorneys for Respondents.

The Daily Record Co., Baltimore, Md. 21202

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United States Constitution First Amendment ..*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1309

MARYLAND PUBLIC INTEREST RESEARCH GROUP,
Petitioner,

v.

WILSON H. ELKINS ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit (Pet. App. 22a) reversing the District Court's decision (Pet. App. 1a) is reported at 565 F.2d 864 (1977). The District Court's decision is reported at 430 F. Supp. 387 (1976).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Court of Appeals correctly held that the University was not required by the strictures of the First Amendment to fund the litigation activities of student organizations.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is adequately set forth in the Petition.

STATEMENT OF THE CASE

At the outset it must be noted that Petitioner's articulation of the "Question Presented" is not the question presented by this case. The Maryland Public Interest Research Group is *not* required to forego litigation *as a condition of receiving its share of student activity funds.* (Pet. 2). Petitioner was granted significant appropriations from University funds upon the condition that it "not use any of the funds *so appropriated* to pay litigation expenses." (Pet. App. 3a). (Emphasis added). Petitioner's misleading and inconsistent statement of the issue presented[1] belies its

[1] On pages 2-9 of its Petition MaryPIRG articulates the issue in an overbroad and contradictory manner. On page 2 it contends that its staff attorneys will be forced to forego litigation *as a condition* of receiving its funds; on p. 3 it similarly states that the Regents imposed that condition upon the organization's receipt of its shares of those funds, and on page 6 it contends that the Court of Appeals has permitted the Regents to utilize "economic pressure as a means of requiring MaryPIRG to forego litigation — an activity protected by the First Amendment." Apparently uncomfortable with those articulations, Petitioner states that the Court of Appeals held that the "First Amendment did not require the Regents to finance any activity of which they disapproved," and the issue presented "therefore, is whether a University's decision not to finance a protected activity is entirely immune from constitutional scrutiny solely because the activity is abridged through a refusal to finance rather than through an absolute prohibition." *See* n.3, *infra.*

refusal to recognize and address the constitutional principles pertinent to the facts of this case: MaryPIRG may freely litigate against any party, including the University, without losing its student activity fee appropriations. The only "condition" involved in this case is the University's decision that it will not fund the litigation activities of its student organizations.

The Maryland Public Interest Research group became a recognized student organization in February, 1974, eligible to receive appropriations from student activities fees subject to the approval of the University's Board of Regents. During that academic year Petitioner received an allocation of $25,437. For the academic year 1975 the organization received $38,619. Such funds, accorded to MaryPIRG "to advocate the public interest in areas of concern to students enrolled in the College Park Campus," (Pet. App. 3a) were the second largest and the largest appropriations awarded to student organizations in those two years, respectively. One limitation was placed upon the University's award — MaryPIRG could not use those University funds to conduct litigation. No student organization has ever been awarded activity fee allocations for this purpose. (Pet. App. 17a). "With no factual dispute before him, the District Judge summarily upheld MaryPIRG's claimed First Amendment grievances and enjoined enforcement of the litigation exclusion apparently relying on *Perry v. Sindermann,* 408 U.S. 593 (1972)." (Pet. App. 24a). The Court of Appeals reversed that judgment holding that the University was not constitutionally compelled "to finance the Plaintiff's assertion of the Amendment." (Pet. App. 26a).

Petitioner's request for rehearing and rehearing *en banc* were rejected and the present Petition was filed with this Court.

REASON FOR DENYING THE WRIT,

THE COURT OF APPEALS PROPERLY HELD THAT THE UNIVERSITY'S REFUSAL TO FUND THE LITIGATION OF A RECOGNIZED STUDENT ORGANIZATION DID NOT CONSTITUTE AN "UNCONSTITUTIONAL CONDITION" ABRIDGING PETITIONER'S FIRST AMENDMENT RIGHTS.

Recent decisions of this Court have made clear that a State's refusal to fund constitutionally protected activities does not amount to a penalty upon an individual's exercise of such rights. *Maher v. Roe,* 432 U.S. 464 (1977); *Cammarano v. United States,* 358 U.S. 498 (1959); *Cf. San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). In seeking a Writ of Certiorari Petitioner has neither acknowledged this principle nor addressed this authority.

Instead MaryPIRG seeks to bring this case within the ambit of *Perry v. Sindermann,* 408 U.S. 593 (1972), and 16 "prior unconstitutional condition decisions" of this Court (Pet. 7). Unlike those cases, this Petition does not involve any State regulation which conditions the award of State benefits, to which MaryPIRG would otherwise be entitled, upon the organization's agreement to relinquish the exercise of its constitutional rights. There is no *quid pro quo* through which the State may seek to limit the spectrum of permissible private conduct.

In *Maher* this Court distinguished the cases upon which Petitioner relies precisely upon this ground holding that Connecticut's decision not to fund elective abortions should not be subjected to "strict scrutiny" under the Equal Protection Clause of the Fourteenth Amendment. After reviewing its earlier authority in *Shapiro v. Thompson,* 394 U.S. 618 (1969) and *Sherbert v. Verner,* 374 U.S. 398 (1963), both cited in *Perry, id.* at 597 and relied upon by Petitioner, (Pet. 7), as well as *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974), this Court held:

> "If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in Shapiro, and strict scrutiny might be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions. But the claim here is that the State 'penalizes' the woman's decision to have an abortion by refusing to pay for it. Shapiro and Maricopa County did not hold that states would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. We find no support in the right to travel cases for the view that Connecticut must show a compelling interest for its decision not to fund elective abortions.
>
> Sherbert v. Verner, 374 U.S. 398 . . . (1963), similarly is inapplicable here." 432 U.S. at 474-75 n.8.

Petitioner is not being denied University funds because it engages in a constitutionally protected activity; it is "simply being required to pay for those activities entirely out of . . . [its] own pocket(s)." *Cammarano, supra,* at 512-13.[2] *Maher* and *Cammarano* make clear that the First Amendment does not "require the Regents to finance any activity of which they" disapprove (Pet. 4).

Petitioner's assertion that under the decision below "governmental officials could do anything from censoring campus newspapers, to prohibiting welfare recipients from suing the welfare department," (Pet. 8-9) is unfathomable. The ruling in no way implicates the question of whether such officials could withhold government funds on the basis of the content of an individual's speech nor does it sanction any condition

[2] Petitioner's reliance upon Speiser v. Randall, 357 U.S. 513 (1958) at p. 7 ignores the express rejection of the applicability of that case under circumstances similar to those presented here in Cammarano at 512-513.

imposed upon the receipt of state benefits requiring an individual to relinquish his right of access to the courts. Unable to demonstrate that the Court of Appeals "has modified the unconstitutional condition doctrine so radically that it can no longer adequately guard against the abuses that it was developed to prevent," (Pet. 9) Petitioner asserts that the record will not support that judgment. In this attack Petitioner cannot prevail.

In reaching its decision the District Court concluded that the University's limitation upon the use of its funds abridged the Petitioner's First Amendment rights and that the University was, therefore, required to demonstrate a compelling State interest for that restriction narrowly drawn so as to entail the least possible instrusion upon MaryPIRG's protected activities. (Pet. App. 8a-9a). This is the argument advanced by MaryPIRG in its Petition (Pet. 7). The Court of Appeals reversed that judgment holding that the First Amendment was not implicated by the University's refusal to finance MaryPIRG's litigation. Although no general due process claim was raised by Petitioner at trial or on appeal,[3] the Court nevertheless considered numerous rational bases advanced by the University in its brief in support of its decision to maintain this limitation upon

[3] In its complaint Petitioner alleged that the "litigation restriction" was imposed in retaliation for its prior litigation which proved embarrassing to the University. The complaint further alleged the violation of the organization's procedural due process rights. Notwithstanding Petitioner's admission and the District Court's finding that "its fourteenth amendment due process and equal protection claims are not presently ripe for summary judgment," (Pet. App. 5a) MaryPIRG has attempted to color its argument by infusing such allegations on p. 5, n.2 of its Petition. The issue is not, therefore, whether the University is "entirely immune" in its funding decisions — the allegations of the Regents' retaliatory motivation in imposing the "litigation restriction" and the supposed denial of MaryPIRG's procedural due process rights await trial in the District Court.

the use of its funds.[4] Such justifications are clearly sufficient to sustain the University's action. Cf. *Bishop v. Wood*, 426 U.S. 341, 349-50, (1976); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

CONCLUSION

For these reasons the Respondents urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General,
STEVEN P. RESNICK,
Assistant Attorney General,
1400 ONe South Calvert Bldg.,
Baltimore, Maryland 21202,
Attorneys for Respondents.

[4] The Court of Appeals apparently found one such ground — that the use of such funds to promote litigation might reasonably be deemed by the Regents to force students not in accord with MaryPIRG's aims to finance beliefs to which they were opposed — compelling. (Pet. App. 27a). *Compare* Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977); International Association of Machinists v. Street, 367 U.S. 740 (1961); Lathrop v. Donohue, 367 U.S. 820 (1961).

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Petitioner,

v.

WILSON H. ELKINS, *et al.*,
Respondents.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

GIRARDEAU A. SPANN
ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

April 14, 1978

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By confusing this Court's decisions involving government funding with the Court's controlling unconstitutional-condition cases, respondents' opposition to the petition for certiorari has highlighted the precise question that this Court should grant certiorari to resolve. It is undisputed that the Regents have placed an absolute condition on MaryPIRG's receipt of student activity funds: if MaryPIRG utilizes its staff attorneys to litigate, its sole source of funding will be terminated. Moreover, because MaryPIRG is financially unable to litigate without relying on its staff attorneys, as a practical matter, MaryPIRG is forced to relinquish its right to litigate in order to obtain its share of funds. This is a classic unconstitutional condition, and the District Court set it aside as such, relying on the established line of authorities traced in *Perry v. Sindermann*, 408 U.S. 593 (1972).

Nevertheless, respondents have attempted to frame the issue as one involving nothing more than a decision not to *finance* a particular activity, citing this Court's recent decisions in *Maher v. Roe*, 432 U.S. 464 (1977), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). However, those cases are inapposite because funding is not the issue here.

Unlike the situation in *Maher*, where a state's refusal to finance elective abortions was upheld after minimal scrutiny under the "rational relationship" test, all of the funds necessary for MaryPIRG to litigate have already been appropriated. The question of whether MaryPIRG's staff attorneys, whose salaries are already being paid, may enter court or not is of absolutely no financial consequence to respondents, to any student, or to any other student organization, since MaryPIRG's funding level will in no way vary as a result of its ability to engage in litigation. Moreover, because the Regents have affected First Amendment rights, their actions must be subjected to strict scrutiny rather than the minimal scrutiny standard applied in *Maher*.

In an effort to bring this case within the ambit of *Abood*, respondents' brief also suggests that the restriction is necessary to protect students from being forced to support public interest activities with which they might disagree. However, this rationale, which has only been asserted by respondents' counsel – never by the Regents themselves – is wholly belied by the fact that no restriction whatsoever has been placed on MaryPIRG's ability to lobby, to testify concerning legislation, or to engage in even the most partisan types of political activity. Only access to the courts has been barred, and it has been barred without any offered justification.

This case does *not* concern how the balance between competing interests should properly be struck. There is no balancing to be done since the Regents have refused to offer any justifications for their restriction. In light of this refusal, as the District Court correctly found, the litigation restriction is an invalid unconstitutional condition. No genuine "funding" issue is even present. Nevertheless, the very fact that respondents and a panel of the Fourth Circuit viewed funding as the predominant issue strongly suggests the need for this Court to clarify the parameters of the unconstitutional condition doctrine in light of the recent decisions now relied upon by respondents.

For the reasons stated herein and in the petition, this Court should grant certiorari.

Respectfully submitted,

GIRARDEAU A. SPANN
ALAN B. MORRISON

2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

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